No. 96-272

In the Supreme Court of the United States

OCTOBER TERM, 1996

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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As we explain in our opening brief, the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) authorizes a continuing nominal award to a claimant who has suffered a reduction in long-term wage-earning capacity but who has no present loss of earnings. The court of appeals in this case erred, however, in ordering such an award without further administrative proceedings.

Our position in this case is not fully consistent with that taken by either of the private parties to the dispute. Petitioner Metropolitan Stevedore Company, supported by amici National Steel and Shipbuilding Company (NASSCO) and National Association of

Waterfront Employers, et al. (NAWE), argues that continuing nominal awards violate the express terms of the Longshore Act. See Pet. Br. 8-19; NASSCO Br. 4-10; NAWE Br. 9-10. Respondent John Rambo contends (Resp. Br. 22-25) that the court of appeals acted within its statutory authority in modifying his termination order by granting a continuing nominal award. We respond to each of those points in turn.

A. 1. Metropolitan and its amici assert that a continuing nominal award is inconsistent with the Longshore Act's distinction between "injury" and "disability," nullifies Section 8(c)(21)'s limitation of compensation to "the continuance of partial disability," and subverts Section 22's one-year limitations period for modification requests. See 33 U.S.C. 902(2), 902(10), 908(c)(21), 922. Those contentions are directed, in substantial measure, at an argument we do not make. Thus, we do *not* contend that a continuing nominal award may appropriately be given to a claimant who fails to demonstrate a "disability," which is defined by the Act as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). Where a claimant fails to satisfy that statutory prerequisite for an award of benefits, we agree with Metropolitan and its amici that a desire to prevent the triggering of Section 22's limitations period cannot justify entry of a nominal award.

We disagree, however, with Metropolitan's contention (Pet. Br. 14) that a Longshore Act claimant must demonstrate *current* economic harm in order to establish a "disability" within the meaning of the Act. Section 8(h) of the Act expressly authorizes the district director or administrative law judge (ALJ) to consider "the effect of disability as it may naturally

extend into the future" in determining a claimant's "wage-earning capacity." 33 U.S.C. 908(h).[1] As we explain in our opening brief (Gov't Br. 17-23), a claimant who proves that he will more likely than not suffer a future loss of earnings as a result of a covered injury has established a "disability," and consequent entitlement to benefits, even if his current earnings have not declined.[2]

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[1] All of the courts of appeals that have found continuing nominal awards to be appropriate under certain circumstances have based their conclusions on the language of Section 8(h), not on the premise that a claimant who fails to demonstrate a "disability" within the meaning of the Act may nevertheless receive an award. See *Hole* v. *Miami Shipyards Corp.*, 640 F.2d 769, 772-773 (5th Cir. 1981); *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 800 (D.C. Cir. 1984); *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 62 (2d Cir. 1989); Pet. App. 11a-13a. Cf. *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1234 n.9 (4th Cir. 1985) (finding that continuing nominal awards "may be appropriate in some cases" and basing the authority for such awards on Section 8(h)).

[2] Section 8(h) provides for a two-step analysis in the determination of a Longshore Act claimant's wage-earning capacity. First, the district director or ALJ must determine whether the claimant's actual earnings "fairly and reasonably represent his wage-earning capacity." 33 U.S.C. 908(h). If actual earnings do not fairly and reasonably reflect wage-earning capacity, the district director or ALJ may then, "in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard" for various enumerated factors, "including the effect of disability as it may naturally extend into the future." *Ibid.*

Metropolitan suggests (Pet. Br. 9) that consideration of anticipated future economic effects is appropriate only after the district director or ALJ has determined, on some other basis, that the claimant's current earnings do not fairly and reasonably reflect his wage-earning capacity. As we explain in our opening brief (Gov't Br. 17-18), that suggestion is incorrect.

A continuing nominal award based on such a showing does not "violate[] the LHWCA's clear distinction between 'injury' and 'disability.'" Pet. Br. 8. Under the standard we advocate, a claimant must show not only that he has suffered a physical impairment, but also that he is more likely than not to suffer future economic loss from a covered injury, in order to receive a continuing nominal award. Although "physical impairment alone does not suffice" to establish an entitlement to benefits (Pet. Br. 14), a claimant need not prove a *current* loss of earnings.[3] Such a requirement is unnecessary to preserve the Longshore Act's distinction between "injury" and "disability," and it is contrary to Section 8(h)'s express authorization to consider the likely *future* effects of a claimant's injury.

Contrary to Metropolitan's contention (see Pet. Br. 8-9), a continuing nominal award based on a likelihood of future economic injury is consistent with Section 8(c)(21)'s provision that partial disability benefits will be payable "during the continuance of partial dis-

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Rather, a claimant's likely future earnings must be considered both in determining whether his actual earnings fairly and reasonably represent his wage-earning capacity and, if they do not, in "fix[ing] such wage-earning capacity as shall be reasonable." 33 U.S.C. 908(h). See *Randall*, 725 F.2d at 796-797; *Devillier* v. *NASSCO*, 10 Ben. Rev. Bd. Serv. (MB) 649, 660-661 (1979). That approach is essential if the term "wage-earning capacity" is to be given a consistent meaning throughout Section 8(h). See Gov't Br. 17-18.

[3] A claimant may demonstrate, for example, that his future earnings are likely to decline because his ability to compete in the open labor market has been impaired. For other examples of situations in which future economic loss may be likely even when the claimant suffers no current economic injury, see Gov't Br. 19.

ability." 33 U.S.C. 908(c)(21). As we explain above and in our opening brief, a claimant who demonstrates a likelihood of future economic loss caused by a covered injury has established a "disability" within the meaning of the Act. That disability continues for so long as the likelihood of future economic loss persists. The employer is free to seek modification of the award, however, by proving that conditions (whether physical or otherwise) have changed such that the claimant is no longer disabled—*i.e.*, that the claimant will, more likely than not, suffer no future economic loss as a result of his injury. See Gov't Br. 23; 33 U.S.C. 922.[4] Our approach therefore does not suggest

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[4] Metropolitan's amici assert that the claimant bears the burden of persuasion in a continuing nominal award proceeding. See NAWE Br. 8; NASSCO Br. 13 n.3. We agree with that proposition with respect to an initial award. Although Rambo had that burden under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), as the proponent of the proposed order awarding benefits in the initial claim proceeding, he carried that burden by establishing that his injury had resulted in a loss of wage-earning capacity. As we observe in our opening brief (Gov't Br. 23), the burden of persuasion has now shifted to Metropolitan, the proponent of the proposed order terminating Rambo's benefits.

We agree that Metropolitan is not required to disprove any possibility of future economic injury. See Pet. Br. 10, 14. As this Court made clear in *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 277-278, 281 (1994), disability determinations under the Longshore Act are governed by a preponderance of the evidence standard. To insist that all doubts regarding the prospect of future economic injury be resolved in the claimant's favor would indeed be inconsistent with that standard. Metropolitan is therefore entitled to an order terminating Rambo's benefits if it proves that Rambo will, more likely than not, suffer no future loss of earnings as a result of his injury. See Gov't Br. 23. Nothing in *Greenwich*

that a claimant retains an entitlement to benefits beyond "the continuance of partial disability." 33 U.S.C. 908(c)(21).[5]

2. Metropolitan contends that a rule permitting continuing nominal awards "rewrites" or "override[s]" the one-year limitation on modification requests established by Section 22 of the Act, 33 U.S.C. 922. See Pet. Br. 8, 16. We disagree. Where a continuing nominal award is based on the likelihood of future economic loss, the award is consistent with both the text and purpose of Section 22's modification provisions.

Metropolitan does not appear to argue that a continuing nominal award is contrary to the literal provisions of Section 22. Such a claim would be untenable. Section 22 does not speak to the substantive determination of whether a claim should be granted or denied (or an award terminated) in the first instance. That determination is governed by Section 2(10) (which defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury"), and by Section 8(h) (which prescribes the approach to be used in determining a claimant's "wage-earning capacity"). If (as we contend) a claimant who proves a likelihood of future economic loss has established a "disability" within the meaning of the Act, nothing in Section 22 can be construed to impose an independent barrier to an award of benefits.

In contending that a nominal award "rewrites" or "override[s]" Section 22, Metropolitan appears to mean only that such an award prevents the triggering of the one-year limitations period that would follow from the outright denial of the claim. But the fact that a continuing nominal award prevents the triggering of the limitations period does not mean that such an award "nullifies" the limitations period (NASSCO Br. 8) or subverts Section 22's effective operation. Although Section 22 requires that modification requests be made within one year after the denial of a claim, that Section also authorizes modification requests "at any time prior to one year after the date of the last payment of compensation." Section 22 thus quite plainly reflects the premise that a claimant who establishes an initial statutory entitlement to benefits should be permitted to obtain an increased award at a later date if the economic consequences of his injury become more severe. See Gov't Br. 24-28. Far from violating Section 22, the approach we advocate furthers the purposes of that provision by ensuring that an injured claimant who establishes a likelihood of future economic harm is not barred from obtaining compensation if and when that harm materializes.[6]

Collieries suggests, however, that the prospect of future economic harm, if proved, provides an insufficient basis for a Longshore Act award.

[5] Contrary to amicus NASSCO's assertion (NASSCO Br. 8), continuing nominal awards do not reflect the premise that a Longshore Act employer "is responsible or liable indefinitely for a LHWCA claimant's continued employment after an industrial injury." Such awards are based not on the prospect of future unemployment as a result of an economic downturn, but on the likelihood that the claimant will be unable to compete for other employment due to the continuing effects of a disabling injury.

[6] Both Metropolitan and NASSCO cite *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952), in support of their contention that continuing nominal awards violate the limitations

B. Contrary to Rambo's contention (Resp. Br. 22-25), the court of appeals exceeded its authority in ordering a continuing nominal award. Rambo asserts that the court of appeals properly conducted an independent review of the record to determine whether the ALJ's decision was supported by substantial evidence. *Id.* at 22. Rambo also contends that the court possessed statutory authority to modify the ALJ's termination order and to enforce the order, as modified, by granting a continuing nominal award. *Id.* at 24-25. Those issues, however, are not in dispute. Rather, the issue here is whether the court of appeals can engage in its own fact-finding and reweighing of facts in support of its decision.

The Benefits Review Board is directed by the Act to give deference to the ALJ's resolution of disputed

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period of Section 22. See Pet. Br. 7-8, 11-12; NASSCO Br. 6-7. *Pillsbury* is inapposite, however, since it involved Section 13(a)'s one-year time limit on initial claims, 33 U.S.C. 913(a), not Section 22's one-year limitation on modification requests. Unlike the limitations period of Section 22, which starts from the "date of the last payment of [an award of] compensation" or "the rejection of a claim," the Section 13(a) time limit construed in *Pillsbury* began with "the injury" of the worker. *Pillsbury*, 342 U.S. at 197 (quoting 33 U.S.C. 913(a)).

Amicus NASSCO also speculates (NASSCO Br. 7) that this Court's endorsement of continuing nominal awards would lead to a substantial increase in Longshore Act litigation. We see no reason to believe, however, that the claimants entitled to nominal awards under our approach—*i.e.*, persons who suffer no current loss of earnings but who are more likely than not to suffer economic harm in the future as a result of a covered injury—will be especially numerous. The requirement that an employee with no present economic loss must demonstrate both a physical impairment and a likely future loss of earnings can be expected to restrict such awards to the most deserving claimants.

factual issues. Thus, "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b)(3). The courts of appeals have consistently recognized that a similarly deferential standard governs judicial review of an ALJ decision that has been affirmed by the Board. See, *e.g.*, *See* v. *Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 380 (4th Cir. 1994) (reviewing court in LHWCA case "must defer to the ALJ's credibility determinations and inferences from the evidence, despite [the court's] perception of other, more reasonable conclusions from the evidence"); *Whitmore* v. *AFIA Worldwide Ins.*, 837 F.2d 513, 515 (D.C. Cir. 1988) (court in Longshore Act case determines "whether the ALJ's findings of fact are supported by substantial evidence on the record taken as a whole"); *Container Stevedoring Co.* v. *Director, OWCP*, 935 F.2d 1544, 1546 (9th Cir. 1991) (court of appeals cannot substitute its views for ALJ's views or engage in *de novo* review of the evidence); *Volpe* v. *Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982) (court of appeals cannot make its own findings of fact).

Because it is the function of the ALJ, not the court of appeals, to make appropriate findings of fact, the reviewing court cannot rule on factual issues never presented to or decided by the ALJ. *Volpe*, 671 F.2d at 701; *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 115 (4th Cir. 1982). In particular, it is the role of the ALJ to consider and make explicit findings on all relevant Section 8(h) factors in determining whether the claimant's post-injury earnings accurately reflect his wage-earning capacity, and whether the claimant's injury is likely

to cause a loss of earnings in the future. 5 U.S.C. 557(c); *Randall*, 725 F.2d at 797, 799; *LaFaille*, 884 F.2d at 61.

Rambo contends that "the decision of the ALJ to completely terminate benefits was not supported by substantial evidence" because the ALJ failed adequately to consider the likely effect of Rambo's injury on his "*future* capacity to earn wages." Resp. Br. 24. The court of appeals similarly concluded that the ALJ's decision was not supported by substantial evidence because "the ALJ overemphasized Rambo's current status and failed to consider the effect of Rambo's permanent partial disability on his future earnings." Pet. App. 13a. Those criticisms, however, go not to the existence of substantial evidence in the record, but to the ALJ's articulation of the reasons for his decision. Moreover, any inadequacy in the ALJ's treatment of the relevant issues could not provide a basis for the court to order a continuing nominal award on its own initiative. Rather,

> [i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power & Light Co. v. *Lorion*, 470 U.S. 729, 744 (1985).

Thus, the ALJ's failure to make explicit findings regarding the likelihood of future economic harm does not support the court of appeals' decision to order a continuing nominal award. Rather, the court should have remanded the case for further administrative proceedings to determine the propriety of such an award. See Gov't Br. 31-33; *Randall*, 725 F.2d at 797-798 (where ALJ fails to make the mandatory Section 8(h) factual findings, the case must be remanded so that those findings can be made); *LaFaille*, 884 F.2d at 61-62.

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For the reasons stated above, and in our opening brief, the judgment of the court of appeals should be reversed. The case should be remanded to the court of appeals with instructions that it be further remanded to the Benefits Review Board for further proceedings regarding the appropriateness of a continuing nominal award.

Respectfully submitted.

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